STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SETH MARSHALL and XANDER WRIGHT, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JESSICA MARSHALL,

Respondent-Appellant.

UNPUBLISHED
May 15, 2007

No. 272710
Marquette Circuit Court
Family Division
LC No. 04-008072-NA

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating her parental rights to the minor children under MCL 712A.19b(3)(c)(i).[1] We affirm.

For a court to terminate a parent's rights to her children, the petitioner is required to establish at least one of the statutory grounds for termination enumerated in MCL 712A.19b(3). *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). Due process requires the evidence to be clear and convincing. *Santosky v Kramer*, 455 US 745, 767; 102 S Ct 1388; 71 L Ed2d 599 (1982). If a statutory ground is established, the trial court is required to terminate the parent's rights unless the record as a whole clearly shows that termination is not in the child's best interests. *In re JK*, *supra* at 211. Conversely, termination may *not* be based solely on the conclusion that doing so would be in the child's best interests. *Id*., 210. We review both findings of fact, that a ground for termination has been sufficiently proven and that the decision to terminate is in the child's best interests, for clear error. *Id*., 209; MCR 3.977(J). Notwithstanding the above, we will not disturb a lower court's order unless "failure to do so

[1] Termination was sought under MCL 712A.19b(3)(c)(i) and (ii). The trial court cited both of these subparts, but it described the basis for seeking termination as respondent's "failure to rectify conditions that led to jurisdiction." We find no indication in the record that the trial court actually relied on part (ii) of subsection (c) as a basis for termination. Termination was also sought under MCL 712A.19b(3)(j), which the trial court declined to find appropriate.

would be inconsistent with substantial justice." *In re TC*, 251 Mich App 368, 370-371; 650 NW2d 698 (2002), citing MCR 2.613(A).

Under MCL 712A.19b(3)(c)(i), termination is appropriate if "[t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." The primary conditions of adjudication were respondent's failure to protect the older child from physical abuse at the hands of her boyfriend Matthew Wright, alcohol and marijuana abuse, attempts to harm herself, failure to provide proper supervision, and failure to benefit from parenting education. More generally, the conditions of adjudication were deemed to be inadequate parenting skills and placement of greater importance on respondent's own needs than on the needs of her children. The trial court found that respondent is no longer involved with Matthew Wright, and she recognizes that her relationship with him was harmful to herself and her children. The trial court also found that there were no recent allegations of attempted self-harm or harm to the children. The trial court did not make any explicit findings on the record that we have before us regarding alcohol or marijuana abuse, but foster care worker Wendy Evans testified that there was no indication that respondent was not free of drugs and alcohol. Finally, we note that respondent obtained her high school diploma and a driver's license, and at the time of the termination hearing she was about to start a job.

The basis for the trial court's decision to terminate respondent's parental rights was that she "continues to put more importance on her own needs than on the best interests of her children, despite her protestations to the contrary," that she participated in parenting education but had failed to demonstrate an ability to improve her parenting and discipline skills, and that she "continues to engage in relationships that meet her own needs at the expense of the children." The trial court concluded that "[t]here seems very little likelihood, given [respondent's] background and personality, that she will ever resolve some of these issues, let alone resolve them within a reasonable time to rectify conditions considering that the children are now four and a half and one and a half." Respondent argues that the trial court ignored the gains she had made and relied on outdated information, and therefore erred in finding that she would not be able to be a proper parent within a reasonable time.

Although respondent's current romantic involvement is contrary to the advice of various service providers, there is no evidence in the record that her partner is abusive or inappropriate in any way; indeed one of respondent's therapists indicated that the current partner is a positive support for respondent. We do not believe the mere fact that a person acts contrary to the recommendations of a service provider is evidence of unfitness *per se* unless the person's acts themselves reflect on her fitness as a parent. See *In re Draper*, 150 Mich App 789, 801-802; 389 NW2d 179 (1986), vacated in part on other grounds 428 Mich 851; 397 NW2d 524 (1987) (holding that "[p]arental rights cannot be terminated for failure to abide by a court order. They can only be terminated based upon a finding of one of the criteria listed in § 19a [now 712A.19b(3)] of the juvenile code." The record does not clearly show that respondent's current relationship would be harmful to the children. Seth's therapist Daniel Forrester expressed concern that contact with a new male partner would trigger fears in Seth, who suffers from posttraumatic stress disorder, but he also testified that Seth would adjust after learning that the person was not abusive. Respondent's domestic violence therapist opined that respondent would be able to maintain a relationship while keeping her children separate from it. Another of

respondent's therapists opined that an appropriate partner in respondent's life but not in the children's lives could provide support for respondent without harming the children; he also indicated that he was "absolutely not" suggesting that this individual was inappropriate in any way.

We place more decisional weight on the trial court's finding that respondent was unable to improve her parenting skills sufficiently. A number of case workers and therapists testified that respondent had difficulty with applying what she was taught and with overall consistency as a parent. There was testimony that respondent consistently failed to implement parenting techniques that she was taught, despite appearing to understand them, possibly because respondent believed that "she had her way" of doing things. There was also testimony that respondent appeared unable to give adequate attention to both children at the same time. Some workers opined that respondent may not have been given a fair chance at having the children returned, that many of respondent's problems were fairly common for parents, or that the stress respondent was under from her family or from having the children removed may have prevented her from giving an accurate indication of her true abilities during the pendency of this action. Some of the testimony indicated that respondent made progress, but slowly. It also appears that many of the workers had not evaluated respondent in any meaningful way since she eliminated Matthew Wright, who was agreed to be one of the most significant problems, from her life. One agreed that retesting might be useful, and the workers generally agreed that respondent wanted to be a good parent. Nevertheless, there was testimony that respondent was simply not willing to change some of her behaviors, that she had poor self-regulation and impulse control, and, irrespective of some progress, that respondent remained likely to engage in risky or unhealthy behaviors in the future.

It appears to us that respondent has made a tremendous amount of progress in her life and that she has improved her circumstances. No parent is required, much less expected, to be perfect. See *In re Newman*, 189 Mich App 61, 70; 472 NW2d 38 (1991). At the same time, there is ample evidence that respondent has difficulties with consistency and that some of her challenges may never be rectified. In particular, it is simply not clear from the record how much her parenting skills really have improved, and in any event, the children require stability in their lives before more time passes. Our review is not de novo; the trial court is in the superior, and in this case unenviable, position of determining witnesses' credibility and making a judgment call on that basis. As Justice Cooley so eloquently put it, "[t]he evidence in the record is not such that any court can feel entirely confident what decree ought to be made; but the circuit judge had better opportunities than we have to judge of the relative credibility of witnesses; and we are not inclined under such circumstances to reverse his decree in a case of doubt." *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881). This is not a clear case. However, we do not see enough doubt in the record for us to reach a "definite and firm conviction that a mistake has been made." *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996). We are unable to say that the trial court committed clear error in finding the conditions of adjudication not completely rectified and unlikely to be rectified within a reasonable time.

Having found a statutory ground for termination satisfied, the trial court must then make a determination of the relative harms between preserving the family unit and providing security and permanency to the children. *In re JK*, *supra* at 211. Seth was clearly traumatized while in respondent's care, and although he took readily to respondent and accepted her affection, he also

acted out severely after visits. His development was delayed while in respondent's care, but since removal he has caught up to what would be expected for his age. Xander has never lived with respondent, and apparently both children have a strong bond with their maternal grandfather, who has been their caregiver throughout the proceedings. There was testimony that respondent's prospects for the future might be positive, but that at present, returning Seth would likely cause him to regress. The trial court noted that terminating respondent's parental rights would likely cause some trauma to the children, but that the evidence as a whole indicated that termination would ultimately cause them the least harm. It is clear from the evidence that no entirely ideal outcome was likely in this case. However, given the children's' need for stability now, we do not find clear error in the trial court's conclusion that the record as a whole did not show termination to be against the children's best interests. MCL 712A.19b(5).

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Alton T. Davis